ber the 30th to Mr. Ong's list fixed for a later date has no bearing on the present proceedings.

In the result therefore I have come to the conclusion that the procedure followed by the Minister, in general, by the Rules that he has made under section 59 of the Ordinance is not contrary to natural justice and is not *ultra vires*. Moreover I do not consider that the applicant, in particular, has suffered any substantial injustice by reason of the procedures that have been followed.

For the reasons that I have given the Rule Nisi must be discharged. There will be no order as to costs.

Rule nisi discharged.

Solicitors: *L. Rayner.*

FRANCIS & ORS. v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Hill and Good JJ. A.) December 7, 1959]

[K. L. — F.M. Criminal Appeal No. 33 of 1959]

Criminal Law and Procedure — Constructive liability — Common intention and common object — Penal Code, ss.34 and 149 — Whether accused can be convicted of an offence by reason of s.34, although charged under s.149 — Criminal Procedure Code (Cap. 6), ss.166 and 167.

The four appellants and five other persons were tried together on a charge of unlawful assembly with the common object of causing hurt to certain others, and knowing that the murder of the deceased was likely to be committed, thereby committing an offence punishable by virtue of section 149 of the Penal Code. The learned trial Judge told the jury that an unlawful assembly must consist of five or more persons, and then proceeded to deal with the difficulty that would arise if they considered that the deceased was murdered or killed in circumstances amounting to culpable homicide not amounting to murder, but were not satisfied that at least five of the accused were involved. On that point he directed their attention to section 34 of the Penal Code and told them that by reason of that section if they were satisfied that the deceased was killed by one or more of the accused in furtherance of a common intention to kill him, then any of the accused who did any act in connection with the killing and who shared in the common intention was guilty of murder or culpable homicide not amounting to murder as the case might be. The five persons who were tried with the appellants were discharged. In the case of the four appellants, the jury found that they killed but did not murder the deceased. The learned trial Judge then ruled that the appellants were guilty under sections 304 and 149 of the Penal Code and entered judgment accordingly.

On appeal, it was argued for the appellants that their convictions under sections 149 and 304 of the Penal Code were bad in law because there was a finding of fact by the jury that only four persons were involved in the attack on the deceased and that as a matter of law four persons cannot constitute an unlawful assembly as defined by section 141 of the Penal Code.

Held: having regard to the provisions of sections 166 and 167 of the Criminal Procedure Code, the appellants in the present case could as a matter of law have been convicted for culpable homicide not amounting to murder by reason of section 34 of the Penal Code, although the charge against them alleged their guilt by reason of section 149, if it was proved that they acted together in causing the death of the deceased and each of them shared in a common intention to cause his death. As the learned trial Judge had fully explained to the jury that being four in number the appellants could not constitute an unlawful assembly but that they could be convicted of culpable homicide by reason of section 34 if there was sufficient evidence of a common intention to kill the deceased, the jury must be taken to have the provisions of that section in mind when they convicted the appellants of culpable homicide not amounting to murder.

Appeal dismissed. Judgment of High Court varied.

Cases referred to:—

(1) *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*, [1942] A.C. 435.

(2) *Barendra Kumar Ghosh* v. *King-Emperor*, 52 I.A. 40, 52.

(3) *Begu* v. *King-Emperor*, 52 I.A. 191, 195.

(4) *Sheo Ram* v. *Emperor*, A.I.R. 1948 All. 162.

(5) *Karnail Singh & Anor.* v. *State of Punjab*, A.I.R. 1954 S.C. 204, 207.

(6) *Lachhman Singh & Ors.* v. *The State*, A.I.R. 1952 S.C. 167.

CRIMINAL APPEAL.

D. R. Seenivasagam for the 1st and 2nd appellants.

K. Y. Khong for the 3rd and 4th appellants.

B. T. H. Lee (Federal Counsel) for the respondent.

Thomson C.J.: This appeal has been urged upon us on purely technical grounds and in consequence the facts of the case need only be dealt with briefly.

It is common ground that on 14th February, 1959, at the premises of one Kuda Baksh at Gunong Rapat New Village near Ipoh there was some sort of a fight in the course of which Mohamed Ali, the son of Kuda Baksh, was stabbed to death. At the same time his mother and one of his brothers received injuries which did not prove fatal. It was the case for the prosecution that the present four appellants and five other persons who were in the event tried with them, that is nine persons in all, in pursuance of some antecedent family squabble assembled together with the common object of causing hurt to Kuda Baksh and his wife and the deceased, that they proceeded to carry that common object into effect and that while doing so Mohamed Ali was killed by one or more of them (there were at least three lethal wounds on his body) in circumstances which constituted the killing murder.

On these premises the nine persons alleged to be concerned were charged with and tried upon the following charge:—

"That you, on or about the 14th day of February, 1959, at Gunong Rapat New Village, in the State of Perak, were members of an unlawful assembly with the common object to cause hurt to Mohamed Ali s/o Kuda Baksh, Kuda Baksh, Ghulam Nabi and Sultano Bee or any one or more of them and that one or more of you murdered the said Mohamed Ali s/o Kuda Baksh and that you all knew the murder of Mohamed Ali was likely to be committed, and that you thereby committed an offence punishable by virtue of section 149 of the Penal Code under section 302 of that Code."

At the close of the case for the prosecution the trial Judge was of the opinion that there was no evidence against three of the accused and he accordingly directed the jury that they should find a verdict of not guilty in the case of these three persons. This was done and the remaining six accused proceeded to make their defences.

In the case of one of the present appellants his defence was that he engaged in the fight, which admittedly took place, in defence of his mother who was one of the accused and anything he did was done in exercise of his right to defend his mother. In the case of the second appellant his defence was that he became involved in the fight as it were accidentally. And in the case of the other two appellants their defences were defences of alibi. One of them was at work and the other was in a prayer house saying his prayers.

The learned trial Judge in his charge to the jury dealt with the case, which was a very confused one, at great length and in great detail. He dealt with the law relating to murder and he pointed out the circumstances in which a killing would amount to culpable homicide not amounting to murder which he referred to colloquially, as Judges in this country almost invariably do, as manslaughter. He pointed out that in the charge criminal liability for murder was imputed to each of the accused by reason of section 149 of the Penal Code because it was said that they were members of an unlawful assembly with the common object of causing hurt to the dead man among others, that in the course of carrying out that common object one or more of them murdered the dead man and that that murder was something they knew was likely to happen in the prosecution of their common object. He told them what an unlawful assembly was and emphasised that one essential condition of an assembly being unlawful is that it must consist of five or more persons. He then proceeded to deal with the difficulty that would arise if they considered that the dead man was murdered or killed in circumstances amounting to manslaughter by one or more of the accused, but they were not satisfied that at least five of the accused were involved and so were not satisfied that there was an unlawful assembly. On that point he directed their attention to section 34 of the Penal Code and told them that by reason of that section if they were satisfied that the dead man was killed by one or more of the accused in furtherance of a common intention to kill him then any of the accused who did any act in connection with the killing and who shared in the common intention to kill was guilty of murder or manslaughter as the case might be.

When the jury returned to Court after considering their verdict the foreman stated that they found the four appellants "guilty of unlawful assembly and manslaughter"; that they found another of the accused (No. 6 on the Charge Sheet) "not guilty of murder or manslaughter but guilty of unlawful assembly" and that they found the remaining accused not guilty of any offence.

Counsel for the appellants would then appear to have submitted that these verdicts amounted to verdicts of not guilty of any offence in the case of all the accused. The trial Judge then proceeded to exercise his power under section 232 of the Criminal Procedure Code to question the jury. With regard to the accused who was said to be not guilty of murder or manslaughter but guilty of unlawful assembly he asked them "do you mean by that verdict that you find that she was a member of the unlawful assembly with a common object to cause hurt?". With regard to the appellants he asked them "do you mean that accused 1, 2, 7 and 8, or one of them, killed but did not murder the deceased Mohamed Ali?". The jury then retired and when they returned the foreman stated that their answer to the first question was "no" and their answer to the second question was "yes".

The Judge then ruled that as regards the woman who was number 6 on the Charge Sheet the verdict was a general one of not guilty and he accordingly discharged her. As regards the appellants he ruled that it was a verdict of guilty under sections 304 and 149 of the Penal Code. Judgment was entered accordingly and three of the appellants were sentenced to five years' imprisonment and the fourth to four years' imprisonment.

Before us the convictions of the four appellants have been attacked on the sole ground that they were convictions under sections 149 and 304 of the Penal Code and that as such they were bad in law because it was clear from the jury's verdict as elucidated by the Judge's questions that there was a finding of fact by the jury that only four persons were involved in the attack on the dead man and that as a matter of law four persons cannot constitute an unlawful assembly as defined by section 141 of the Penal Code.

Although based to some extent on the English Criminal Law as it was about 1860, the Penal Code differs from the English Law in some very fundamental respects. In particular, it ignores the division of criminal offences into felonies and misdemeanours nor does it regard participators in crime as principals in the first or second degree as does the law of England in relation to felonies only. Instead, apart from questions of conspiracy and abetment with which we are not concerned here, it deals with what may be called constructive liability for crime in sections 34 and 149 and it is important to note just how these sections deal with that question.

Section 34 says that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. Here, the conditions are some overt act, not necessarily the full criminal act itself, and a common intention.

Section 149 has to be read in the light of sections 141 and 143. Section 141 defines an unlawful assembly as an assembly of five or more persons having any one of a number of specified common objects one of which is to commit any offence. Section 143 creates the specific offence of being a member of an unlawful assembly. Section 149 provides that if an offence is committed by a member of an unlawful assembly then every member of the same assembly is guilty of that offence if either it is committed in prosecution of the common object of the assembly or it is such as the members of the assembly know to be likely to be committed in prosecution of the common object. Here the conditions are that there must be a common object, for without a common object there can be no assembly, and then either that common object must be to commit the offence which is in question or where the common object is not to commit it there must be knowledge that the offence is likely to be committed in prosecution of the common object.

The first point to be observed here is that although section 34 does not like section 149 create a specific offence both sections have this in common that each prescribes conditions in which a person may be convicted for something that is constituted a substantive offence by the other provisions of the Code. Where, for example, the offence in question is murder in contravention of section 302, section 34 provides that if its conditions are fulfilled each of the persons who has fulfilled them is liable for the murder as if he had committed it alone. Again, section 149 provides that if its conditions are fulfilled then any person who fulfils them is by reason of it guilty of the offence of murder.

The second point to be observed is that although section 34 uses the expression "common intention" and section 149 uses the expression "common object" these expressions may or may not mean different things according to the facts of the case. Object and purpose mean the same thing and it may well be as was pointed out by Viscount Simon, L.C., in another connection in the case of *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* [1] :—

> " The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realize or should realize will follow, but what is in truth the object in the minds of the combiners when they acted as they did. It is not consequence that matters, but purpose; the relevant conjunction is not wote 'so that . . . . .' but 'iva 'in order that' ".

In other words it can be argued that the effect of the use of the word "object" in section 149 is to exclude any sort of constructive intention such as might arise from the presumption that a man must be held to intend the natural and probable consequences of his acts.

Again, it may well be in the case of an unlawful assembly that certain members of it have in addition to the common object which they share with its other members private intentions of their own which only have the quality of being unnlawful in common with the common object.

On the other hand there may well be circumstances in which object and intention are the same where parties act not only "so that" but also "in order that" a particular result may follow.

The position is summarised in the following passage from the judgment of Lord Sumner in the case of *Barendra Kumar Ghosh* v. *King-Emperor* [2] in which their Lordships were primarily concerned with the interpretation of section 34:—

> "Section 149, ... creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object — namely, one of those named in section 141: . . . . . — and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of section 34, is replaced in section 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap."

Having reached these conclusions it is clear that in the present case any of the accused could as a matter of law have been convicted for murder or for manslaughter by reason of section 34, although the charge against them alleged their guilt by reason of section 149 if it was proved that they acted together in causing the death of the deceased and each of them shared in a common intention to cause his death within the meaning of section 299 or section 300. That is clear from the provisions of sections 166 and 167 of the Criminal Procedure Code, the combined effect of which was thus stated by Viscount Haldane in the case of *Begu* v. *King-Emperor* [3] :—

> "A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made."

We find support for this view in certain decisions of the Courts in India. .

In the case of *Sheo Ram* v. *Emperor* [4] the Allahabad Court considered the effect of the decision of the Privy Council in the case of *Barendra Kumar Ghosh* v. *King-Emperor, supra* on certain previous Indian decisions and concluded by holding (at p. 165) that:—

> "A person can be convicted of an offence read with section 34, Penal Code, if the facts of the case justify it and if the accused has not been misled in his defence and if there has been no failure of justice, irrespective of the fact whether the charge framed against him mentioned section 34, Penal Code, or not, or the charge framed against him was a charge of an offence read with section 149, Penal Code."

That is an Allahabad case but the same conclusions have been reached in two recent decisions of the Supreme Court of India.

In the case of *Karnail Singh & Anor.* v. *State of Punjab* [5] the Court said:—

"It is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. If the common object which is the subject-matter of the charge under section 149 does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under section 149 would be the same if the charge were under section 34, then the failure to charge the accused under section 34 could not result in any prejudice and in such cases the substitution of section 34 for section 149 must be held to be a formal matter."

The Court then referred to its earlier decision in the case of *Lachhman Singh & Ors.* v. *The State* [6]. That was a case which was very much on all fours with the present one. Five persons had been charged with murder by reason of section 149. Three of them were acquitted, and the other two were convicted of murder by reason of section 34 although there had been no alternative charge invoking the aid of section 34. Fazl Ali, J., dealt with the point as follows (at p. 170):—

"It was also contended that there being no charge under section 302 read with section 34, Penal Code, the conviction of the appellants under section 302 read with section 149 could not have been altered by the High Court to one under section 302 read with section 34, upon the acquittal of the remaining accused persons. The facts of the case are however such that the accused could have been charged alternatively, either under section 302 read with section 149 or under section 302 read with section 34. The point has therefore no force."

In the present case, having regard to the whole tenor of the trial, to the Judge's summing-up and to his subsequent questioning of the jury as read in the light of that summing-up we are of the opinion that so far as the appellants are concerned the intention of the jury and their true verdict was that each of the appellants was guilty of culpable homicide not amounting to murder in contravention of section 304.

The jury had in effect been told that if they were satisfied that there was an unlawful assembly of five or more persons having the common object of causing hurt and that these persons knew that murder was likely to be committed and that murder was committed, then it was open to them to convict each of the persons concerned of murder or manslaughter as the case might be because of the provisions of section 149. They were then told that if there was an assembly which was not unlawful only by reason of its consisting of less than five persons then it was open to them on the evidence to convict the persons concerned of murder or manslaughter as the case might be by reason of section 34 if they were satisfied that each of these persons took part in the killing in prosecution of a common intention to kill, an expression which was explained to them at great length.

In the event there was some confusion as to the case of the woman standing number six on the Charge Sheet with whose case we are not concerned here as she has been acquitted and in effect they decided that she was not guilty of any offence. That was a verdict of not guilty so far as she is concerned. As regards the four appellants, they clearly reconsidered the position in the light of the consideration which had already been fully explained, that being only four in number they did not constitute an unlawful assembly. They were asked if the appellants or one of them killed but did not murder the deceased Mohamed Ali. The terms of that question considered in isolation were not happy but in view of all that had been said by the Judge in his summing-up and in view of what the jury had already said to the effect that each of the appellants was guilty of manslaughter and unlawful assembly they could only interpret that question by the Judge as being whether they meant that, having regard to the provisions of section 34, they were still of the opinion that these appellants were guilty of manslaughter. And the answer to that question was "yes".

In the circumstances we are compelled to dismiss the appeal but in pursuance of our powers under section 29(1) of the Courts Ordinance we vary the judgment of the High Court by substituting in the case of each of the appellants a judgment of culpable homicide not amounting to murder in contravention of section 304 for the judgment entered under sections 304 and 149.

Appeal dismissed.

Solicitors: *S. Seenivasagam & Son*; *Khong & Son.*

RAMASAMY CHETTIAR v. WONG POH FATT

[O. C. J. (Pretheroe J.) October 4, 1956]

[Ipoh — Originating Summons No. 59 of 1956]

Money and Moneylending — Statement of account - Production of — Moneylenders Ordinance, 1951, s.21(1) — Non-compliance with.

When a moneylender embarks on any proceedings in any Court, a statement of his account as prescribed by section 21 (1) of the Moneylenders Ordinance, 1951 must be produced at the time the Originating Summons was filed. Non-compliance with this statutory requirement is an irregularity which the Court cannot waive and will entitle the respondent to have the Originating Summons dismissed with costs.

Arjan Singh v. *Hashim Angullia* [3] followed.

[Editorial Note: section 21(1) of the Federation Moneylenders Ordinance, 1951 corresponds to section 22 of the Singapore Moneylenders Ordinance, 1959].

Cases referred to:—

(1) *Guthrie* v. *Fisk*, 8 B. & C. 178.

(2) *In re Nance*, [1893] 1 Q.B. 178.

(3) *Arjan Singh* v. *Hashim Angullia & Ors.*, [1941] M.L.J. 55.

ORIGINATING SUMMONS.

W. J. Huntsman for the applicant.

K. C. Chan for the respondent.

Pretheroe J.: This is an application initiated by way of an Originating Summons